upon an appellate court by section 316 of the Criminal Procedure Code is, as already mentioned, discretionary. How that discretion is to be exercised would depend upon the particular circumstances of the particular cases coming before an appellate court. In the case of *Matukdhari Singh* v. *Janardan*[4] at p. 358 paragraph 7, the Indian Court stated that it has pointed out that a retrial may be ordered for a variety of reasons which it is hardly necessary or desirable to state in a set formula and the observations of that court are illustrative but not exhaustive. Further, "The Code gives a wide discretion and deliberately does not specify the circumstances for the exercise of the discretion because the facts of cases that come before the courts are extremely dissimilar. We pointed out that it would not be right to read the observations of this court (intended to illustrate the meaning of the Code) as indicating in advance the rigid limits of a discretion which the Code obviously intended should be developed in answer to problems as they arise. We gave some illustrations of our own which fell outside those observations but which might furnish grounds, in suitable cases, for an order of retrial." In the case of *Rajeswar Prasad* v. *The State of West Bengal & Anor.*[5] at page 1891 paragraph 8, the Indian Court stated: —

"But the Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives a power to the appellate court to take additional evidence, which for reasons to be recorded, it considers necessary. The Code thus gives power to the appellate court to order one or the other as the circumstances may require leaving a wide discretion to it to deal appropriately with different cases."

At page 1892 in the same paragraph the court went on to say: —

"Cases may arise where either of the two courses may appear equally appropriate. Since a wide discretion is conferred on appellate courts, the limits of that courts' jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt, some analogy between the power to order a retrial and the power to take additional evidence. The former is an extreme step appropriately taken if additional evidence will not suffice."

It should be mentioned here that the corresponding provisions in the Indian Code of Criminal Procedure giving power to an appellate court to order a retrial are in substance similar to section 316 of ours. It seems clear therefore on the authorities that where an appellate court considers that it is in the interests of justice which do not prejudice the appellant, the apellate court has the discretionary power to order a retrial in an appeal. In this respect, it would be just as well to remind oneself that "The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners" (*per* Lord Goddard C.J. in the case of *Rex* v. *Grondkowski*,[6] quoted with approval by the then Federation Court of Appeal in *Liew Kaling & Ors.* v. *Public Prosecutor*[7]).

I would reiterate that had the proceedings in the lower court showed that if the chemist PW2 had been asked to elaborate on what was meant by the Indian hemp mentioned in his evidence there is nothing to suggest that his answer would invariably be that the Indian hemp meant the type of Indian hemp as defined in section 2 of the Dangerous Drugs Ordinance. It could well be otherwise; or it could be that when he had mentioned the Indian hemp he had not in mind the statutory definition of that expression. Quite clearly, therefore, in the interests of justice the point should have been clarified in the lower court which was not done, because, as I have stated, in the absence of clarification, how was a trial court to make a proper decision on the charge against the applicant.

Hence, for the reasons given, I do not consider that the questions posed involve any question of law of public interest, one of the requirements set down in section 66(1) of the 1964 Act. For the same reasons, I do not consider that the questions posed should be referred to the Federal Court for decision. Accordingly, the application is refused.

Since the decision of the appeal, some water had already flowed under the bridge and I consider that it would be in the interests of all parties concerned that the retrial should take place as soon as possible and accordingly, I order an early retrial.

*Order accordingly.*

Solicitors: *Tang & Co.*

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## IDRIS BIN HAJI SALLEH v. FEDERAL AUTO HOLDINGS BHD.

**[O.C.J. (Syed Agil Barakbah J.)**
**October 28 and December 9, 1978]**
**[Alor Star — Civil Suit No. 186 of 1976]**

*Practice and Procedure — Pleadings — Defence filed out of time — Application for extension of time to file defence — Court's discretion to decide on merits — R.S.C. 1957, O. 21 r. 6, O. 27 r. 11.*

The plaintiff, a contractor, entered into a hire-purchase agreement with the defendants whereby they let a Volvo wheel-loader to the plaintiff. Subsequently, the plaintiff found that the machine was defective. As a result, he could not carry out his contract work satisfactorily and thereby suffered loss. The plaintiff claimed against the defendants rescission of the said agreement, return of the sum of $42,000 and damages for breach of contract.

The writ was served on the defendants on July 11, 1976. The defendants filed appearance on July 17, 1976. On the request of their solicitors, the defendants were given a month's grace from July 17, 1976 to file their defence, and on further request were allowed another week to do so. However, the defendants failed to file their defence. On August 26, 1978 the plaintiff filed a notice of motion for judgment in default of defence. On October 28, 1978 the defendants applied for an extension of time to file the defence.

**Held:** (1) a defence delivered after the proper time cannot be disregarded even though it is not delivered until after the plaintiff has served notice for judgment under the rule. In such a case, the court will have regard to the contents of the defence delivered out of time and deal with the case in such a manner that justice can be done;

(2) in the present case, judgment in default had not been obtained. The courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application.

*Cases referred to:-*

(1) *Gill* v. *Woodfin* (1884) 25 Ch. D. 707, C.A.

(2) *Gibbings* v. *Strong* (1884) 26 Ch. D. 66 C.A.
(3) *Safety Insurance Co. Ltd.* v. *Hua Seng Electric Co.* [1968] 1 M.L.J. 273.
(4) *Packirisamy* v. *Janagi* [1970] 2 M.L.J. 202.
(5) *Chinese Tin Mines Rehabilitation Loans Board* v. *Chee Hoi Voon* [1959] M.L.J. 152.
(6) *Tang Chok Ching* v. *Wong Ik Tieng & Ors.* [1973] 2 M.L.J. 25.
(7) *Foo Chiew Fong* v. *Guriman* [1957] M.L.J. 51, C.A.
(8) *Atwood* v. *Chichester* (1878) 3 Q.B.D. 722, C.A.

CIVIL SUIT.

*R.C. Murugeson* for the applicants/defendants.

*S.P. Annamalai* for the respondent/plaintiff.

*Cur. Adv. Vult.*

**Syed Agil Barakbah J.:** This is an application by the defendants for an extension of time to file the defence. The plaintiff filed a writ together with a statement of claim on June 23, 1976. The statement of claim alleges that the plaintiff, who is a contractor, entered into a hire-purchase agreement with the defendants, a limited company, on November 7, 1974, whereby the defendants let a Volvo wheel-loader to the plaintiff who informed the defendants that he required the machine as an earth loader to work for a long stretch of time at work sites. The plaintiff found subsequently that the machine was defective. In spite of the repairs being done by the defendants' mechanics, the defects could not be corrected and the spare parts were not readily available. As a result, the plaintiff could not carry out his contract work satisfactorily and thereby suffered loss. The plaintiff alleges that he was induced by diverse misrepresentations by the defendants to enter into the hire-purchase agreement which he would not have done had he been aware of the same. The plaintiff claims that the defendants have committed a breach of the implied terms of the agreement. Oral notice to rescind the agreement and requiring the defendants to return the sum of $42,000 paid by the plaintiff on the agreement was given but the defendants refused to return the money. The plaintiff's claims against the defendants are for the rescission of the said hire-purchase agreement, the return of the sum of $42,000, damages for misrepresentation, breach of warranty or breach of contract, interest and costs.

The writ was served on the defendants on July 11, 1976. The defendants filed appearance on July 17, 1976. On the request of their solicitors the defendants were allowed by the plaintiff's solicitors one month's grace from July 17, 1976, to file a statement of defence, and on further request were allowed another week to do so. However, the defendants failed to file a statement of defence. On August 26, 1978, the plaintiff filed by notice of motion for judgment in default of defence with the same prayers as stated in the statement of claim and stating the abovementioned facts in the affidavit accompanying the motion. On October 28, 1978, the defendants filed the summons-in-chambers for the extension of time to file the present application.

In the first place, there is a delay of about two years in which the defendants filed a statement of defence together with the application. The reasons for the delay are given at paragraph 2 of the accompanying affidavit, viz. frequent transfers of managers, the salesman, mechanics and workshop supervisor involved in the transaction and repairs to the machine having left the company thus involving considerable time in tracing them and getting the opinion of the engineers and for further reports of attendance to the servicing of the said machine and changing of spare parts. To my mind, the grounds appear to be reasonable but such a long delay could have been avoided. However, the plaintiff also delayed in filing a motion for judgment. He also took about two years to send the second letter to the defendants' solicitors to file a statement of defence within one week. He could have applied for judgment much earlier. In the circumstances I do not therefore consider the delay on both sides as being material to the present case. Under Order 21 rule 6 of the Rules of the Supreme Court, a defendant is required to deliver his defence after having entered an appearance within fourteen days from the time limited for appearance or from the delivery of the statement of claim, whichever is the later. There was one month's extension by consent in writing as mentioned earlier and the defendants should have filed the defence immediately thereafter as required under proviso (a) of the said rule. The plaintiff by filing the motion for judgment relies on Order 27 rule 11 which allows him to set down the action on motion for judgment which shall be given as upon the statement of claim the court or judge shall consider the plaintiff to be entitled. The accepted rule under this is that a defence delivered after the proper time cannot be disregarded even though it is not delivered until after the plaintiff has served notice for judgment under this rule. (See *Gill* v. *Woodfin*[1]). In such a case the court will have regard to the contents of the defence delivered out of time and deal with the case in such a manner that justice can be done. (See *Gibbings* v. *Strong*[2]).

In *Gill's* case, the defendant made default in putting in a statement of defence and the plaintiff gave notice of motion for judgment in default of defence. But before the motion was heard the defendant put in a statement of defence. It was held by the Court of Appeal that the statement of defence, though put in after time, could not be treated as a nullity and that the plaintiff was not entitled to judgment in default of defence. But as the statement of defence disclosed no real defence to the action, the court ordered the notice of motion to be amended and judgment to be given for the plaintiff on the admission in the statement of defence. There was in that case a delay of about one year.

In *Gibbings'* case, the court refused to look at the defence and gave judgment according to the statement of claim in which the appellant brought an action against the respondent and another asking for an account and foreclosure and for payment of bill of costs into court. The Court of Appeal treated the case as one for an account or taxation and held the plaintiff was not entitled to an order on the bill of costs but only an account of what was due in respect of the costs. At page 70 Cotton L.J. said: —

"...I think it is the duty of a judge, when an action comes before him on motion for decree in default of pleading, to

look at everything the knowledge of which may enable him to do justice between the parties. The plaintiff was entitled to move under Order XXIX, rule 10, but, especially having regard to rule 14, I do not think that where a defence has actually been put in, rule 10 can be construed as obliging the court to pay no attention to it, because it was put in after time and without leave."

In the present case, the statement of defence while admitting the execution of the hire-purchase agreement and giving the plaintiff representations, contends the reference should be made to its full terms and effect and that the representations are correct and in no way false or fraudulent and/or with any intention to mislead the plaintiff. The defendants further allege that the defects were due to the failure of the plaintiff and/or his servants and agents and the lack of proper maintenance of the said machine by them in contravention of the recommended user thereof by the defendants. Further, routine service of the new machine and effective repairs were carried out with spare parts readily available at all material times. They also aver that the implied conditions were excluded and in the alternative that the said machine was of merchantable quality. I remember in the course of argument it was stated that the said machine was sold to a third party after it was taken back by the defendants on the failure of the plaintiff to pay any of the instalments according to the agreement. The defendants also filed a counterclaim against the plaintiff for arrears of such instalments in consequence of which the defendants repossessed the machine.

The cases cited by the learned counsel for the plaintiff are easily distinguishable because the applications therein are to set aside judgment or order made in default. In the *Safety Insurance Co. Ltd.* v. *Hua Seng Electric Co.*[3] and *Packirisamy* v. *Janagi,*[4] Order 19 rule 3(3) of the Subordinate Courts Rules, 1950, applies so that apart from the necessity for the applicants to show there was a good defence in the action, the rule requires a good reason to be given for his absence when judgment in default was ordered against him. Ali J. (as he then was) in the first case cited above, also held that the practice adopted by the High Court in a similar matter was not applicable. The case of *The Chinese Tin Mines Rehabilitation Loans Board* v. *Chee Hoi Voon*[5] was concerned with a motion to set aside a judgment in default of defence under Order 13 rule 10 of the Rules of the Supreme Court. It was held that if the judgment was a regular judgment then it is an almost inflexible rule that there must be a certificate of merits stating facts showing a substantial ground of defence. Lapse of time is no bar to the application. In *Tang Chok Ching* v. *Wong Ik Tieng & Ors.,*[6] the Federal Court made a similar ruling where judgment was given in default of appearance in the court of the first instance. It was the duty of the appellant to show the judgment was irregular or that he had a *prima facie* defence on the merits.

In the present case, judgment in default has not yet been obtained. The courts in a case of this nature prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application. (*per* Mathew C.J. in *Foo Chiew Fong* v. *Guriman*[7]).

In the circumstances I am of the opinion that there are merits in the defence and evidence ought to be called, particularly in respect of the hire-purchase agreement to satisfy the court as to the terms thereof and the implied conditions and other matters raised by the defence and relevant to the case in order that justice can be done.

The application is allowed and the time to file the defence is extended.

I order that the plaintiff be compensated for by the payment of costs to which he should be entitled in the circumstances. (*Atwood* v. *Chichester*[8]).

By consent the amended statement of defence and counterclaim are to be filed within one week from today with costs to the plaintiff.

The notice of motion by the plaintiff is dismissed.

*Order accordingly.*

Solicitors: *R.C. Murugeson; Karpal Singh & Co.*

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## ZULKARNAINI BIN MOHAMED NOOR v. SYED OMAR BIN MOHAMED & ANOR.

**[O.C.J. (Mohamed Zahir J.) December 10, 1978]**
**[Kuala Trengganu — Election Petition No. 16 of 1978]**

*Election — Election petition — Amendment of — Application to amend date — Whether allowable — Election Offences Act, 1954, ss. 32, 33(4), 34, 38(1) & (2), 42(1).*

The petitioner sought to amend his election petition filed on September 3, 1978. He quoted in his petition that the date of the election was on July 8, 1978 and he sought to amend it to June 21, 1978 and to add another clause to the petition to read as follows: "And such non-compliance has affected the result of the said election."

**Held,** dismissing the application: (1) the date describes the election and if one were to present an election petition in which the date of the election is wrongly quoted then the election is non-existent although there is a mistake on the part of the petitioner;

(2) in the case of an election petition, time to present the election petition is as short as 21 days and if amendments are sought beyond this period the case is already time-barred and the court ought not to allow such amendment;

(3) failure to comply with the Election Offence Act in filing the petition allows the Election Judge to dismiss the petition. That being the case, the petitioner ought not to be allowed to amend his petition which was a nullity.

*Cases referred to:-*

(1) *Muip bin Tabib* v. *Dato James Wong* [1971] 1 M.L.J. 246.
(2) *Tildesley* v. *Harper* (1878) 10 Ch. D. 393.
(3) *Attorney-General* v. *West Ham Corporation* (1910) 74 J.P. 196.
(4) *Hipgrave* v. *Case* 28 Ch. D. 361.
(5) *Chong Thain Vun* v. *Watson & Anor.* [1968] 1 M.L.J. 65.
(6) *Stevens* v. *Tillett* (1870) L.R. 6 C.P. 147.
(7) *Abu Bakar* v. *Mohamed Zain* [1967] 1 M.L.J. 168.
(8) *Dean* v. *Wiesengrund* [1955] 2 Q.B. 120.
(9) *Colguhoun* v. *Brooks* (1888) 21 Q.B.D. 52.
(10) *Tengku Korish* v. *Mohamed bin Jusoh* [1970] 1 M.L.J. 6.
(11) *Devan Nair* v. *Yong Kuan Teik* [1967] 1 M.L.J. 261.
(12) *Steward* v. *The North Metropolitan Tramways Company* (1885) Q.B.D. 178.